PREME COURT, U. S.

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No. 848

In the

Supreme Court of the United States

OCTOBER TERM 1968

HAL HALL AND SNOW BLACKBURN HALL,
Petitioners,

v.

PAUL J. BLEISCH AND LIANA BLEISCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	
1. The United States District Court and the Court of Appeals failed to give full faith and credit to the prior state court judgment which is res judicata of the claims sought to be asserted by Respondents herein, and the allowance of a recovery against Petitioners in the face of that judgment is a violation of due process.	7
2. Having elected to assert a cause of action against Petitioners in the state court proceeding for alleged negligence causing the automobile accident in question, Respondents were not entitled to withhold elements of that cause of action for later independent adjudication in federal court, and the federal judicial system should recognize the conclusive effect of the final state court judgment upon the entire cause of action.	14
3. The role of Respondents' insurance carrier in the state court case should not deprive Petitioners of the effects of a valid and final state court judgment.	22
Conclusion	24
Appearance and Certificate of Service	26
Appendix A	A-1
Appendix B	B-1

	Page
Beach v. Runnels, 379 S.W. 2d 684, er. ref.	20, 23
Brewster v. Kable News Co., 148 F. 2d 610	12
Burnaman v. Heaton, 240 S.W. 2d 288 (Sup. Ct.)	12
Chem-Gas Engineers, Inc. v. Texas Asphalt & Refining Co., 398 S.W. 2d 143	20
Cormier v. Highway Trucking Co., 312 S.W. 2d 406	15, 17
Davis v. Davis, 305 U.S. 32, 83 L. Ed. 26	8
Economy Food & Liquor Co. v. Transport Distillers Corp., 232 F. 2d 410	12
Erie Ry. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188	8
Forrester v. Southern Ry., 268 F.S. 194, (N.D. Ga. 1967)	8
Garrett v. Matthews, 343 S.W. 2d 289	15, 17
Gautreaux v. City of Port Arthur, 406 S.W. 2d 531	20
Guaranty Trust Co. of New York v. York, 326 U.S. 99, 89 L. Ed. 2079	8
Harris v. Jones, 404 S.W. 2d 349 (1966)	24
Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 85 L. Ed. 725	7
Jarrard v. Southeastern Shipbuilding Corp., 163 F. 2d 960	12
Keller v. Keklikian, 244 S.W. 2d 1001 (Mo.)	23
Lacy v. Carson Manor Hotel, Inc., 297 S.W. 2d 367, er. ref. n.r.e.	9, 18, 25
Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 88 L. Ed. 149	8
McConnell v. Travelers Ind. Co., 346 F. 2d 219 (C.A. 5th, 1965)	8
Ogletree v. Crates, 363 S.W. 2d 431 (1963)	8

Page

Owens v. Peeples, 391 S.W. 2d 493 15

Pesce v. Linaido, 123 So. 2d 747 (Fla.) 23

Pick Mfg. Co. v. Gen. Motors Corp., 80 F. 2d 639 12

Rhodes v. Prudential Leasing Corp., 413 S.W. 2d 404 (1967) 11

Riley v. New York Trust Co., 315 U.S. 343, 89 L. Ed. 885 8

Schott v. Colonial Baking Co., 111 F.S. 13 20

Standard Oil Co. v. Clark, 163 F. 2d 917 12

State v. Reagan County Purchasing Co., 186 S.W. 2d 128, er. ref. w.o.m. 12

Stringer v. Munnell, 390 S.W. 2d 484, er. ref. 20, 24

Traders & General Ins. Co. v. Richardson, 387 S.W. 2d 478, er. ref. 16, 24

U. S. v. Eastport SS Corp., 255 F. 2d 795 20

U. S. v. R.C.A., 46 F.S. 654, app. dism., 318 U.S. 796, 87 L. Ed. 1161 12

U. S. v. Silliman, 167 F. 2d 607, cert. den., 355 U.S. 825, 93 L. Ed., 379 8

Other Authorities

Cheatham, Res Judicata and the Full Faith and Credit Clause, 40 Col. L. Rev. 330 8

Fifth Amendment to the U. S. Constitution 3

1b Moore's Federal Practice, 2nd Edition, Sec. 0.411 [2-] 9

Rule 97(a), Texas Rules of Civil Procedure 3, 17

28 U.S.C., § 1738 2, 7

Vestal, The Constitution and Preclusion/Res Judicata, 62 Mich. L. Rev. 33 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Said Honorable Court:

Petitioners Hal and Snow Blackburn Hall, Appellants in the proceeding below, pray that a writ of certiorari issue to review the Judgment herein of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The per curiam memorandum opinion of the Court of Appeals was handed down September 30, 1968, and is set out as Appendix A hereto, with the judgment of that Court as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was entered September 30, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a final state court judgment entered prior to the filing of this action in federal court, concerning the same automobile accident, the same subject matter, the same law and facts, and the same adversary parties is res judicata of the present action.

2. Whether the United States District Court for the Western District of Texas and United States Court of Appeals for the Fifth Circuit failed to give full faith and credit to the state court judgment as required by 28 U.S.C., §1738, and such failure amounted to a denial of due process.

3. Whether the Texas prohibition against splitting a cause of action and the compulsory counterclaim rule, and the policies behind such rules, bar the present action by Respondents.

STATUTES AND RULES INVOLVED

1. 28 U.S.C., §1738, insofar as material here, provides as follows, concerning "the records and judicial proceedings of any court" of "any State, Territory or Possession of the United States":

> "Such Acts, records and judicial proceedings or copies thereof, as authenticated, shall have the full faith and

> credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

2. Rule 97(a), Texas Rules of Civil Procedure, provides as follows:

> "A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of a transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third persons of whom the court cannot acquire jurisdiction. * * *"

3. The Fifth Amendment to the Constitution of the United States, insofar as material here, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *"

STATEMENT OF THE CASE

On July 9, 1965, a three-car accident occurred in Iraan, Texas, at the intersection of Texas Highway 29 and Texas Highway 349. Mr. and Mrs. Paul Bleisch were in a Volkswagen which collided with an Oldsmobile driven by Mrs. Hall; after this collision, the Volkswagen struck a parked Buick owned by J. E. Coles (Coles' Petition, State Court Proceeding, R. 20-27; Plaintiffs' Federal Court Amended Complaint, R. 39-52; Defendants' Motion for Dismissal, Federal Court, R. 6-10). As a result of the accident, J. E. Coles sustained property damage to his Buick (R. 20-27),

and Mr. and Mrs. Bleisch sustained personal injuries and property damages (R. 39-52).

On May 19, 1966, Coles brought suit in the District Court for Pecos County, Texas, 112th Judicial District, naming as defendants H. H. Hall and wife, Snow Blackburn Hall, and Paul Joseph Bleisch and wife, Liana Bleisch. The petition described the accident occurring on or about July 9, 1965, in Iraan, Texas, at the intersection of Highway 29 and 349, and sought damages jointly and severally from all defendants because of the actionable negligence of the two drivers, Mrs. Hall and Mrs. Bleisch (R. 20-28). Coles obtained personal service upon Mr. and Mrs. Bleisch in California (R. 28-30), and appearances were subsequently made on behalf of Mr. and Mrs. Bleisch and on behalf of Mr. and Mrs. Hall in the state court action (R. 31-34; 35-38).

The pleadings filed for Mr. Hall and his wife in the state court suit included a cross-action against Mr. and Mrs. Bleisch, alleging negligence of Mrs. Bleisch as a proximate cause of the accident (R. 32-34). A cross-action was filed by Mr. and Mrs. Bleisch against the Halls, making this express allegation:

> "* * * If plaintiff should recover anything against these defendants, then let it have judgment for indemnity over and against defendants H. H. Hall and wife, Snow Blackburn Hall; in the alternative, in the event that judgment be rendered against these defendants on plaintiff's cause of action, then these defendants pray that they have judgment for contribution from the defendants H. H. Hall and wife, Snow Blackburn Hall. * * *" (R. 37.)

An agreement was made by all parties concerning disposition of the state court action and all matters which were or might have been asserted therein; this agreement was embodied in a final judgment entered by the 112th Judicial District Court of Pecos County, Texas, on February 25, 1967, (R. 10-13). The judgment included the following language:

> "It is further Ordered, Adjudged and Decreed by the Court that:
>
> > "(1) That the defendants H. H. Hall and wife, Snow Blackburn Hall; * * * go hence, free and clear of all claims, demands, and causes of action, which have been or which might have been asserted against them in this suit by J. E. Coles, dba Coles Chevrolet Company, or any other person, firm or corporation.
> >
> > "(2) * * *
> >
> > "(3) That Paul J. Bleisch and wife, Liana Bleisch, recover nothing on their cross-action for indemnity of and from the cross-defendants H. H. Hall and wife, Snow Blackburn Hall."

The state court judgment was not appealed and became final; similarly, no action to modify, correct, amend, or change the state court judgment in any respect has ever been instituted (R. 8-9).

On March 3, 1967, five days after the entry of the state court judgment, this action was filed in the United States District Court for the Western District of Texas by Paul J. Bleisch and Liana Bleisch against Hal Hall and his wife, Mrs. Snow Hall (R. 1-4), seeking damages for personal injuries allegedly sustained in the accident of July 9, 1965,

in Iraan, Texas, at the intersection of Highway 29 and Highway 349 (R. 1-2). Jurisdiction in federal court was founded upon diversity of citizenship. After service of summons in the federal court action on March 21, 1967 (24 days after the entry of the state court judgment), defendants moved for dismissal under Rule 12(b) (6), Federal Rules of Civil Procedure, on the grounds of the legal effect of the prior state court proceedings between these same parties (R. 6-13). In the motion the final state court judgment was expressly recited, and a certified copy of the judgment was attached and incorporated therein.

In response to defendants' motion for dismissal, Respondents filed three affidavits (R. 13-20), the substance of which was that while both Mr. and Mrs. Bleisch knew of the pendency of the state court action and acknowledged retention of the attorney defending them in this action through their insurance carrier, and that while their personal attorney, Frank Butters, knew judgment was to be entered in the state court prior to its actual entry (R. 19-20), still neither Mr. nor Mrs. Bleisch was personally aware of the exact terms of disposition of the state court suit.

At the hearing on the motion for dismissal, certified copies of all pleadings in the state court action were presented and considered by the Court (R. 60-62); the Court overruled the motion without noting the reasons for this action (R. 39). Petitioners excepted to the overruling of their motion for dismissal, "which exception was in all things allowed" (R. 60-62). Petitioners thereafter answered in the case, asserting once more that this action was wholly and completely barred by the earlier state court proceedings

between the parties (R. 54). The Court directed that the case proceed to trial, and after a verdict of $14,575.00 was returned, judgment was so entered for Respondents (R. 57-58) despite Petitioners' motion with respect thereto, which again raised the prior state court proceedings as a bar to entry of such a judgment (R. 58-62).

Appeal was duly perfected to the United States Court of Appeals for the Fifth Circuit, which affirmed by a short per curiam opinion.

REASONS FOR GRANTING THE WRIT

I.

The United States District Court and Court of Appeals failed to give full faith and credit to the prior state court judgment which is res judicata of the claims sought to be asserted by Respondents herein, and the allowance of a recovery against Petitioners in the face of that judgment is a violation of due process.

While the full faith and credit clause of the United States Constitution refers to the effect to be given "in each State to the * * * judicial proceedings of every other State," 28 U.S.C., § 1738, is broader in that it requires full faith and credit to be given the valid judgments of any court of any State "in other courts within the United States and its Territories and Possessions." It is well settled that under the statute federal courts are included among those that must extend full faith and credit to state judgments. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183,

85 L. Ed. 725; *Davis v. Davis*, 305 U.S. 32, 83 L. Ed. 26, etc. Certainly a federal court in the same state should give full faith and credit to a valid state court judgment.

The doctrine of full faith and credit supports and gives effect to the doctrine of res judicata. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 88 L. Ed. 149, *U. S. v. Silliman*, 167 F. 2d 607, cert. den., 355 U.S. 825, 93 L. Ed. 379; Cheatham, Res Judicata and the Full Faith and Credit Clause, 40 Col. L. Rev. 330; Vestal, The Constitution and Preclusion/Res Judicata, 62 Mich. L. Rev. 33. Thus, as stated by this Honorable Court in *Riley v. New York Trust Co.*, 315 U.S. 343, 89 L. Ed. 885, "the local doctrines of res judicata, speaking generally, become a part of national jurisprudence."

Likewise, since federal jurisdiction herein was based on diversity of citizenship, the state law of Texas is determinative under the *Erie* doctrine. *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 89 L. Ed. 2079. In particular, state law applies to questions of res judicata in diversity cases. *McConnell v. Travelers Ind. Co.*, 346 F. 2d 219 (C.A. 5th, 1965); *Forrester v. Southern* Ry., 268 F.S. 194 (N.D. Ga. 1967).

The Courts below have failed to give the state court judgment here its clear effect under the laws of the State of Texas, and thus have denied it full faith and credit.

The Supreme Court of Texas in *Ogletree v. Crates*, 363 S.W. 2d 431 (1963), declares:

> "The rule of res judicata in Texas bars litigation of all issues connnected with a cause of action or defense

> which, with the use of diligence, might have been tried in a former trial, as well as those which were actually tried."

The per curiam opinion of the Court of Appeals misses the point that in the state court proceeding here the Bleisches did assert a cause of action against the Halls and thus were not merely co-defendants with the Halls but were in the position of plaintiffs asserting a cause of action against them. Thus, the question is really not whether the Bleisches were required to assert a cross-action against their co-defendants, but rather whether, having asserted a cross-action, they were required to include within it all of the claims they had against the Halls growing out of this accident, rather than merely part of them. Thus, the language and rule of the *Ogletree* case directly applies, contrary to the view of the Court of Appeals. This is made clear by the Texas case of *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W. 2d 367, er. ref. n.r.e., discussed below.

The Court of Appeals errs in assuming that co-parties cannot also be opposing parties. Of course, co-defendants as such are co-parties, but they can also be opposing parties and will be if either asserts an action or claim against the other. This is clearly pointed out in 1b Moore's Federal Practice, 2nd Edition, Sec. 0.411[2]:

> "As a general proposition, the requirements of identity of parties and mutuality are not satisfied, and persons who were co-parties to a prior suit are not concluded, in subsequent litigation between themselves, by the judgment rendered in the suit in which they were co-parties, *unless they occupied positions adverse to one another in the suit to which they were co-parties.* * * *

> If a claim for relief was asserted by one co-party against the other, litigated between them and adjudicated by the judgment in the suit to which they were co-parties, then the co-parties were clearly adversaries, the judgment is res judicata between them and all issues adjudicated by the judgment between them are concluded under the doctrine of collateral estoppel."

Here the Halls and Bleisches did assert claims for relief against each other in the state court action. Therefore, they were opposing parties as well as co-parties, and the judgment in the first action is res judicata between them.

The state court judgment clearly adjudicates more than the damage claim of Coles. The first operative paragraph disposes of that claim by dismissing it with prejudice, and no further provisions in the judgment were needed as to it. If disposition of the Coles' claim had been the only consideration of the state court and the parties when the judgment was entered, no further judgment provisions would have been needed or included. However, the judgment does not stop with the dismissal with prejudice of the action by Coles but expressly goes on to order, adjudge and decree that "the Defendants, H. H. Hall and wife, Snow Blackburn Hall * * * go hence, free and clear of *all claims, demands, and causes of action, which have been or which might have been asserted against them in this suit by* J. E. Coles, d/b/a Coles Chevrolet Company, or *any other person, firm or corporation.*"

Such language might not bind any other person, firm or corporation which was not a party to the case or privy to a party, but Mr. and Mrs. Bleisch were parties and are

bound by this part of the judgment as well as receiving benefits from the judgment, which likewise releases them. This paragraph was intended to put an end to litigation between all of the parties to the state court action with respect to this automobile accident, and the plain language of the judgment so provides.

The state court judgment likewise specifically provides that Mr. and Mrs. Bleisch recover nothing on their cross-action against the Halls, and vice versa.

The validity of the state court judgment has not been attacked nor has the jurisdiction of the state court. The adversary parties here appeared as adversary parties in the state court case and presented actions against each other as well as defending against the action of Coles. The fact the state court judgment was an agreed judgment does not detract from its effect as res judicata in a subsequent suit, and an agreed judgment under Texas law is as conclusive as a judgment rendered after contest. Thus, *Rhodes v. Prudential Leasing Corp.*, 413 S.W. 2d 404 (1967), declares:

> "These undisputed facts evoke the rule that a judgment of dismissal entered by agreement of the parties in pursuance of a compromise, or settlement of a controversy, becomes a judgment on the merits. See Stephenson v. Gaines, 298 S.W. 401 (Tex. Comm. App., 1927);—Van Cleave v. Bell Oil & Gas Co., 102 S.W. 2d 1103 (Tex. Civ. App. — Ft. Worth, 1937, err. dism.). That such judgment is conclusive, not only on the matters actually raised and litigated but also is conclusive on every other matter which the parties might have litigated and had decided as an incident to or

> essentially connected with the subject matter of the litigation. *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W. 2d 216 (1942)."

Other Texas cases making clear the res judicata effect of an agreed judgment include *Burnaman v. Heaton*, 240 S.W. 2d 288, (Sup. Ct.); *State v. Reagan County Purchasing Co.*, 186 S.W. 2d 128, er. ref. w.o.m. etc. This is likewise recognized by the federal cases. *Standard Oil Co. v. Clark*, 163 F. 2d 917; *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F. 2d 639; *U. S. v. R.C.A.*, 46 F.S. 654, app. dism. 318 U.S. 796, 87 L. Ed. 1161; *Economy Food & Liquor Co. v. Transport Distillers Corp.*, 232 F. 2d 410; etc.

The res judicata effect of a state court judgment is to be recognized in federal court. *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F. 2d 960; *Brewster v. Kable News Co.*, 148 F. 2d 610, etc.

The state court judgment of February 25, 1967, is a valid final judgment in a case dealing with the three-car accident of July 9, 1965, and in which the present parties were asserting causes of action against each other arising out of that accident, as well as opposing the claim of Coles. Certainly the claims later asserted by the Bleisches in federal court might have been asserted in the state court proceedings along with the indemnity claim they did assert. Since the Bleisches and the Halls were litigating against each other in the state court action in connection with this accident, the state court judgment is a bar not only as to the claims they actually brought against each other in that action but also those which they "might have litigated"

in connection with the same subject matter, the accident of July 9, 1965.

The scanty opinion of the Court of Appeals cites no prior cases in support of its position, and there are none. It states that the "issue" presented in the federal suit was not an issue in the state court litigation nor such an issue as to require the application of res judicata, but in fact the issue in the federal action was very much in issue in the state court proceedings. Respondents as Plaintiffs in federal court sought damages on the grounds of negligence on the part of Mrs. Hall in colliding with them on or about July 7, 1965, at the intersection of Highways 29 and 349 when they themselves were "proceeding in a careful and prudent manner." Thus, the issue in the federal case is the respective negligence of Mrs. Hall and Mrs. Bleisch as causing the July 7 accident. Likewise, the issue in the cross-action of the Bleisches against the Halls in the State Court proceeding, seeking contribution or indemnity, was the same issue of the respective negligence of the two drivers, Mrs. Hall and Mrs. Bleisch, as was likewise true of the cross-action of the Halls against the Bleisches. Only the elements of damages were different.

No attention has been given by either of the courts to the express provision in the state court judgment that the Halls go free and clear of all claims and causes of action which have or might have been asserted against them in that suit by Coles or anyone else. That provision has been denied any effect. The state court judgment similarly provided with respect to the Bleisches going free and clear of all claims

that might have been asserted against them, and the Halls therefore could not now sue them for damages growing out of that accident.

In disregarding the express terms of the state court judgment, the federal courts below have failed to give it full faith and credit, and this amounts to a denial of due process. Just as the due process clause of the Fifth Amendment acts as a check upon federal power to extend the effect of res judicata improperly, so it also restrains a federal court from improperly restricting or refusing effect to a state court judgment. See Moore's Federal Practice, 2d E., §0.406[2], as to the interrelation between res judicata and due process.

II.

Having elected to assert a cause of action against Petitioners in the state court proceeding for alleged negligence causing the automobile accident in question, Respondents were not entitled to withhold elements of that cause of action for later independent adjudication in federal court, and the federal judicial system should recognize the conclusive effect of the final state court judgment upon the entire cause of action.

It is well established in Texas, as in most states, that a party may not split a single cause of action and litigate different phases of the same cause of action in different forums. It is likewise established that a party has but a single cause of action for a single wrongful or negligent act or omission, regardless of how many separate items of damage therefrom there may be. Such cause of action

cannot be split or fragmented, and a judgment as to any element of damage may be pleaded in bar of a later action to recover for other elements.

This principle is even applied as to personal injuries and to property damage received in the same accident. *Cormier v. Highway Trucking Co.*, 312 S.W. 2d 406; *Owens v. Peeples*, 391 S.W. 2d 493. It applies even though the first judgment may be an agreed judgment. Thus, in *Garrett v. Matthews*, 343 S.W. 2d 289, there was an agreed judgment in a suit on a personal injury claim and thereafter the same claimant brought an action for property damage from the same accident. Defendant asserted the prior judgment as res judicata, and the Texas courts sustained this position, the Court of Civil Appeals declaring:

> "We feel compelled to follow the authority of the Cormier case so well reasoned by Chief Justice Murray and hold with that court that there is no good reason why the parties should be put through the expense and trouble of two lawsuits when the grounds of recovery of the two items of damage must be based on exactly the same facts."

That reasoning likewise applies here. Out of the accident here involved, the Bleisches had three possible elements of damage from the claimed negligence of Mrs. Hall: (1) for personal injuries to Mr. and Mrs. Bleisch; (2) for property damage to the Bleisch automobile; and (3) for reimbursement of all or part of their possible liability to Coles. They did bring a crossclaim or cross-action against the Halls in the state court proceedings for one of those elements and under Texas law were not permitted to fragment their cause of

action by reserving other elements for future litigation in another court.

The Texas policy in this connection is so strong that it has even been applied not only to the original parties but to their privies, including an insurance company with a subrogation claim. Thus, in *Traders & General Ins. Co. v. Richardson*, 387 S.W. 2d 478, er. ref., a truck insurer brought a subrogation suit to recover back the sum it had paid its insureds for damage to their truck from a collision with another vehicle, suing the driver of the other vehicle and her husband. It was held that the insurer was barred because in a previous action the truck driver and his brother, the other owner, had brought a suit for personal injuries which was concluded by an agreed judgment that they take nothing against the other driver and her husband. The Court stated:

> "There was one cause of action arising out of the collision between Jack Haflin and Martha Richardson. This was a cause of action for damages which included property damages to the truck and personal injury damages to Jack Haflin. Both elements of damages could be recovered in the suit by Jack Haflin and George Haflin against Martha Richardson. Even though there may be doubt as to whether or not the pleadings in the original suit were specific enough to include property damage to the truck, there is no doubt but that this was a proper element of damages which could be recovered under the one cause of action. The payment of money by Traders & General Insurance Company to Jack and George Haflin and the execution of the subrogation papers by Jack and George Haflin to Traders & General Insurance Company did not effectively split the cause of action. The splitting of the

> cause of action for damages under the circumstances in this case is not permitted under the law of this state. *Garrett v. Matthews* (Tex. Civ. App. 1961) 343 S.W. 2d 289; *Cormier v. Highway Trucking Co.* (Tex. Civ. App. 1958) 312 S.W. 2d 406. Traders & General Insurance Company could have protected itself by filing an intervention while the first suit was pending. The judgment in the first suit is a bar to any recovery in this present suit."

Rule 97(a), Texas Rules of Civil Procedure, providing for compulsory counterclaims applies to any claim "the pleader has against any opposing party" arising out of the same subject matter as the opposing party's claim. The Court of Appeals states that any claim by the Bleisches against the Halls in the state court litigation for the damages sought in federal court would have been a crossclaim rather than a counterclaim apparently on the ground that they were co-parties rather than opposing parties.

When the state court suit was originally filed by Coles, it is true that the Bleisches and the Halls were co-parties, but when the Halls filed a cross-action or crossclaim against the Bleisches, and the Bleisches did likewise against the Halls, then they did become opposing parties so that the compulsory counterclaim rule became operative as between them. They were no longer merely co-defendants as to the Coles action, and with the filing of the Hall's action against them the Bleisches stood in the status of defendants and the Halls as plaintiffs as to that action. They were now adverse parties, each asserting that the accident in question was solely the fault of the other and seeking affirmative relief from the other.

The courts below have overlooked the fact that the Bleisches were not merely co-defendants with the Halls as to the Coles action, but were cross-defendants as to the action brought against them by the Halls as cross-plaintiffs, and with respect to this action by the Halls, they were opposing parties and any claim against the Halls arising out of the same accident was a compulsory counterclaim with reference to the action or crossclaim of the Halls against them.

A Texas case specifically dealing with this exact point is *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W. 2d 367, er. ref. n.r.e. There a bank brought action against the makers and accommodation makers of a note, and the accommodation makers filed a cross-action against the makers for judgment over against them. It was declared that while the makers and accommodation makers were originally co-defendants, the filing of a cross-action by the accommodation makers against the makers brought the compulsory counterclaim rule into play so that any counterclaim which the makers may have had against the accommodation makers for damages for alleged fraudulent representations in connection with the transaction was a compulsory counterclaim, and therefore judgment in that action was res judicata in a subsequent action by the makers against the accommodation makers for damages for the alleged fraudulent representations. It will be noted that the cross-action by the accommodation makers which made the counterclaim of the makers compulsory was for indemnity.

With reference to the contention in the second suit that the action of the makers was barred on principles of res judicata as a compulsory counterclaim that should have been asserted as a defense to the cross-action of the accommodation makers in the litigation by the bank, the court had this to say:

> "The question of law thus posed is an interesting one and it is also our view that this further contention of appellees is well taken. Rule 97(a) provides: Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, *which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.* (Emphasis ours.) Our rules of procedure are to be liberally construed, Rule 1, to the end that litigation may be conducted impartially and expeditiously resolved. *Stone v. Texas Emp. Ins. Ass'n*, 154 Tex. 21, 273 S.W. 2d 59.
>
> "In the verified motion of appellees they say that in the 1952 Bank suit plaintiffs appeared and advised the court that they had no defense to the cross-action of defendants Collis P. Irby and Carson Manor Hotel, Inc.; whereas in the present suit plaintiffs claim heavy damages by reason of defendant Irby's refusal to aid in renewal of the $50,000 note, which wrongful act, additional to the fraud alleged, caused them to default in installment payments. To the extent that the present suit has validity, it would have constituted an offset to the cross-action of appellees in the Bank litigation, and hence logically a compulsory counterclaim as arising out of the transaction or occurrence that is the subject matter of the opposing party's (appellees') claim. Of course the trial court under Rule

> 174 would be authorized to later order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues *in furtherance of convenience or to avoid prejudice.* (Emphasis ours.)"

While this might be considered dictum since the action was also held barred by limitations, it is the clearest discussion of the precise question in any Texas case and very clearly and expressly asserts the view of the Texas court that the res judicata contention was well taken. There are no Texas cases to the contrary, and indeed none elsewhere in either state or federal courts, except the holding of the Court of Appeals here.

If Rule 97(a) were intended only to apply to claims of a defendant against the original plaintiff, it would have referred to claims a "defendant" has against a "plaintiff." However, it is very pointedly worded instead in terms of any claim a "pleader" has against "any opposing party," so that it is clearly intended to have a wider application.

The effect of the failure to assert the compulsory counterclaim in one action is to preclude the party from later bringing an independent action upon it. *Beach v. Runnels*, 379 S.W. 2d 684, er. ref.; *Stringer v. Munnell*, 390 S.W. 2d 484, er ref.; *Gautreaux v. City of Port Arthur*, 408 S.W. 2d 531; *Chem-Gas Engineers, Inc. v. Texas Asphalt & Refining Co.*, 398 S.W. 2d 143. The result is the same in federal court. *U. S. v. Eastport SS Corp.*, 255 F. 2d 795; *Schott v. Colonial Baking Co.*, 111 F.S. 13. The Schott opinion points out that a federal court should follow the state law with respect to

res judicata in a diversity case, and directly does so as to a compulsory counterclaim situation.

However, the real point is not the compulsory counterclaim rule as such, nor the distinction between crossclaim and counterclaim, but rather the fact that the Bleisches and the Halls did choose to assert causes of action against each other in the state court action. We say that when the Halls asserted their action against the Bleisches, the compulsory counterclaim rule then came into play to require the Bleisches to assert any claim they had arising out of the same accident (as pointed out by *Lacy v. Carson Manor Hotel, Inc., supra*), but even more importantly that when the Bleisches did file their claim against the Halls in the state court action, whether they were required to file any claim or not, they then were required to include their entire cause of action growing out of the same accident and could not restrict themselves to part of it. Having elected to assert a claim against the Halls, whether it be considered a counterclaim or a crossclaim, they were required to include in it all elements of their cause of action and not just part of them or else be barred from future assertion of any omitted elements of damage from the same accident.

This is required by the basic public policy behind the doctrine of res judicata, the compulsory counterclaim rule, and the rule against splitting causes of action.

Even if we assume that the Bleisches could have elected merely to defend against Coles in the state court action without asserting any claim against the Halls, they did not

do so. They elected to take a position adverse to the Halls and to bring a claim against them arising out of this accident. Under the law, they are not allowed to fragment that claim and bring different parts of it in different proceedings.

The Bleisches had a single cause of action against the Halls for all kinds of damage claimed to arise from Mrs. Hall's alleged negligence in causing the automobile accident. Having asserted that cause of action as to some claimed elements of damage in state court and having allowed a valid final judgment to dispose of that part of their cause of action, they are not entitled to pursue other fragments of the same cause of action in an independent federal court proceeding.

III

The role of Respondents' insurance carrier in the state court case should not deprive Petitioners of the effects of a valid and final state court judgment.

As shown by the affidavits filed by Respondents in opposition to the Motion to Dismiss, they took the position below that they should not be bound by the prior state court judgment because it was handled by attorneys employed by their insurance carrier, without their knowing of or consenting to the exact wording of the judgment.

Of course, both Mr. and Mrs. Bleisch did have personal notice of the state court action and were personally served therein and actually had independent personal counsel in addition to the attorneys employed by their insurer and are

charged with knowledge of the law, including that relative to res judicata, compulsory counterclaims, and the splitting of causes of action. If they have been mistreated or wronged by their insurer, then perhaps they have a cause of action against it, but under the law of Texas it is clear that the role of an insurer in such a situation does not prevent the application of res judicata.

The leading Texas case in this connection is *Beach v. Runnels*, 379 S.W. 2d 684, er. ref. The Beach and Runnels automobiles collided, with property damage and personal injuries to both parties. Runnels sued Beach, and Beach's insurance carrier employed attorneys to answer and defend him. The suit was settled by the attorneys employed by the insurer "without the consent of Beach and his personal attorney," and an order of dismissal entered. Thereafter Beach sued Runnels for personal injuries and property damage. Runnels filed a motion for summary judgment on the ground that Beach's claim was in the nature of a compulsory counterclaim barred by dismissal of the prior suit. Beach answered with the contention that his insurer was responsible for the settlement and that he should not be barred by its action. This contention was rejected and it was held that the motion for summary judgment was properly sustained and that no exception would be engrafted upon Rule 97(a) or the principles of res judicata because of the handling of the original case by an insurance carrier. Cases from other jurisdictions to the same effect were cited, including *Keller v. Keklikian*, 244 S.W. 2d 1001 (Mo.), and *Pesce v. Linaido*, 123 So. 2d 747 (Fla.).

The same question was presented in *Stringer v. Munnell*, 390 S.W. 2d 484, er. ref., and *Harris v. Jones*, 404 S.W. 2d 349 (1966), which reaffirmed the result of *Beach v. Runnels*. The principal of unity of the cause of action is also applied to bar an insurance company, as seen in *Traders & General Ins. Co. v. Richardson*, 387 S.W. 2d 478, er. ref., discussed *supra*.

While Respondents may have a meritorious claim against their insurance carrier, their remedy is against that carrier rather than recovery here against Petitioners in disregard of the legal effect of the state court judgment.

CONCLUSION

This case goes to the root of the relation between the state and federal judiciaries and is concerned with the duty of the federal courts to give full faith and credit to a valid final state court judgment. The failure of the federal courts to give the proper lawful effect to such a judgment is a federal denial of due process under the Fifth Amendment. Thus, the subject matter is one calling for the exercise by this Court of its power of supervision to insure the proper treatment of state court judgments in the federal courts.

The specific question is one of first impression here, but the judgment of the Court of Appeals is contrary to the reasoning and policy of a vast body of state and federal law. It would create a bad and dangerous precedent. The kind of situation here involved is not uncommon and will become increasingly frequent in the future, as our crowded

highways give rise to more and more multiple car collisions. Moreover, the principle of allowance by federal courts of the proper res judicata effect to a state court judgment is by no means restricted to motor vehicle accidents and is of much wider applicability.

The decision of the Court of Appeals as to the Texas law is directly contrary to the Texas law as revealed by *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W. 2d 367, er. ref. n.r.e., on a matter as to which the state law is controlling.

It is therefore urged that this Petition should be granted.

Respectfully submitted,

RUSH MOODY, JR.,
Midland, Texas,

ROYAL H. BRIN, JR.,
2200 Fidelity Union Tower,
Dallas, Texas 75201,
Attorneys for Petitioners.

By Royal H. Brin, Jr.

APPEARANCE AND CERTIFICATE OF SERVICE

I, ROYAL H. BRIN, JR., hereby request the Clerk to enter my appearance as counsel for Petitioners Hal Hall and Snow Blackburn Hall, and as one of the attorneys for said Petitioners and a member of the Bar of the Supreme Court of the United States, I hereby CERTIFY that on the 16th day of December, A.D. 1968, I served a true and correct copy of the foregoing Petition for Certiorari by depositing the same in the United States Post Office with first class postage prepaid addressed to Johnny Splawn, Splawn & Maner, P. O. Box 1437, Lubbock, Texas, attorney of record for Respondents.

Royal H. Brin, Jr.

Royal H. Brin, Jr.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25647

HAL HALL and SNOW BLACKBURN HALL,
Appellants,

v.

PAUL J. BLEISCH, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Texas

---

(September 30, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: The parties to this appeal were involved in a three car acident. The owner of the third car sued them in state court to recover property damages. They crossclaimed, one as against the other, for indemnity as to the third party's property damage. The case was settled by a consent judgment in the state court. Appellees then brought suit in the federal court against the Halls, seeking damages for personal injuries.

The district court did not err in rejecting the defense based on res judicata. The issue presented in the federal suit was not in issue in the state court litigation which appellant asserts as having given rise to the bar, nor is it such an issue as would require the application of res judicata under Texas law. The case of *Ogletree v. Crates*, 363 S.W. 2d 431 (Tex. S. Ct. 1963), relied on by the appellants, extends only to requiring the assertion of all defenses that a defendant might have against a plaintiff. We do not read it to require the assertion of possible cross-claims by co-defendants.

There is likewise no merit in the contention that the suit is barred by the failure of appellees to comply with the Texas compulsory counterclaim rule in the state court litigation. The claims asserted were crossclaims and not counterclaims. Rule 97, Texas Rules of Civil Procedure; Rule 13, Federal Rules of Civil Procedure; and Wright, Federal Courts, p. 306 (1963).

AFFIRMED.

APPENDIX B

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25647

D. C. Docket No. CA 67-17-P

HAL HALL and SNOW BLACKBURN HALL,
Appellants,

v.

PAUL J. BLEISCH, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Texas

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Hal Hall and Snow Blackburn Hall, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 30, 1968 Issued as Mandate: Oct. 22, 1968

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No. 848

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

HAL HALL AND SNOW BLACKBURN HALL,
Petitioners,

vs.

PAUL J. BLEISCH, ET AL.,
Respondents.

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SPLAWN, MANER & NELSON
P. O. Box 1437
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INDEX

Statement of the Case 2

Reasons for Denying Jurisdiction 4

Reasons for Denying Writ 5

I. The United States District Court and Court of Appeals did not fail to give full faith and credit to the prior state court judgment, which was for property damages only by a third party never a party to the present suit, which judgment was not, and could not have been res adjudicata to the claims for personal injuries awarded and allowed respondents by both the Trial Court and the Court of Appeals 5

II. Respondents never elected to assert a cause of action in the state court for negligence against petitioners, because a property damage claim only was brought by a third and unrelated party against both respondents and petitioners in state court as co-defendants only, which claim was settled by and between the respective insurance companies and the third party, without the knowledge or consent of respondents. This was done and the judgment distinctly recited "without prejudice" to the rights of respondents to bring their primary claim for damages for personal injuries against petitioners. Hence it did not constitute a withholding of elements of the previous state court action for later independent adjudication in federal court as alleged by these petitioners 5

III. The separate actions and role of the insurance carriers for both respondents and petitioners, together with the separate legal counsel for both insurance companies, who settled without respondents' knowledge or consent a small prop-

erty damage claim by agreed state court order of dismissal, which was originally brought by an independent and separate third party was not res adjudicata as to these respondents, and did not bar the separate and independent claim for personal injuries that has been asserted in federal court 6

Summary and Conclusion 20

Prayer 22

Certificate 23

Appendix A—Judgment and Opinion of the United States Court of Appeals, Fifth Circuit, September 30, 1968 ..... A1

TABLE OF CASES

Amer. Cur. Co. of N. Y. v. *Fazel*, D.C. Iowa, 1956, 20 F.R.D. 110 11

Angle v. *Shinholt, et al.*, 90 F. 2d 294 19

City Transportation Co. of Dallas v. *Vastures*, 278 S.W. 2d 373 18

Cormier v. *Highway Trucking Co., et al.*, 312 S.W. 2d 406 (Tex. Civ. App.) 15

Garrett v. *Matthews*, 343 S.W. 2d 289 (Tex. Civ. App.) 15

Harrison v. *Remington Paper Company*, 140 Fed. 385, 199 U.S. 607, 50 L. Ed. 331 19

Hurley v. *McMillan*, 268 S.W. 2d 229 17

Jackson v. *Clark*, 351 S.W. 2d 292 18

Lacy v. *Carson Manor Hotel*, 297 S.W. 2d 367 7

Ogletree v. *Crates*, 363 S.W. 2d 431 (1963) 7

Traders & General Insurance Co. v. *Richardson*, 387 S.W. 2d 478 (Tex. Civ. App., err. ref.) 15

U.S.A.C. Transport, Inc., et al. v. *Corley*, 202 F. 2d 8 16

Wieding v. *Krisch*, 271 S.W. 2d 458 17

RULES

Federal Rules of Civil Procedure—

Rule 13 ..... 10, 13, 15, 20
Rule 13 (a) 15, 20
Rule 13 (g) 9, 15-16, 20
Rule 97 (a) 7

Texas Rules of Civil Procedure—

Rule 13 (a) 7
Rule 97 ..... 10, 12-13, 15
Rule 97 (a) 15, 20
Rule 97 (e) 9, 15, 20

TEXTS

32 A.L.R. 2d 937 18
Barron and Holtzoff (Wright ed.), C. 7, § 398, Opposing Parties 12
Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, Vol. 1A, C. 7, § 397, Cross-Claims 11, 12, 14
32 Texas Jurisprudence, 2d, § 453, p. 682 17
Wright, Federal Courts, C. 10, § 80, Cross-Claims 10, 12

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

HAL HALL AND SNOW BLACKBURN HALL,
Petitioners,

VS.

PAUL J. BLEISCH, ET AL.,
Respondents.

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUDGE OF SAID COURT:

Respondents Paul Bleisch and wife Liana Bleisch, appellees in the proceeding below, respectfully request that this petition for writ of certiorari be dismissed for want of jurisdiction, or in the alternative denied or refused, for the reasons set out in the per curiam Judgment and opinion rendered by the United States Court of Appeals for the Fifth Circuit, September 30, 1968. (See this opinion as set out verbatim in appendix A).

STATEMENT OF THE CASE

On July 9, 1965, Petitioner, Snow Blackburn Hall, drove her car from a cleaning and pressing shop parking area, and without taking any precautions or keeping a proper lookout drove directly onto a through highway and plowed into the Volkswagen being driven by Respondent Liana Bleisch causing it to slam into a concrete median and skid on its top for approximately 75 yards and strike a car owned by the Cole Chevrolet Company that was parked in front of Cole's place of business. Cole instituted suit in a State Court against Petitioners and Respondents as Co-Defendants, for *property damage to his vehicle only.* When the Bleisch Respondents received notice of the Cole suit for property damages only, as residents of California they notified their insurance carrier in California of the same, and the insurance carrier, by and through its attorneys hired in Midland, Texas, filed an answer in the state proceedings. Further, cross-claims for indemnity and contribution were filed in connection with the property damage claim only, by the Respondents' insurance carrier on their behalf, against Petitioners as Co-Defendants, and *not* as opposing parties.

All three insurance carriers and their attorneys without the knowledge of the Bleisch Respondents got together and split up the spoils on the Cole automobile damages only, and the first time the Bleisch Respondents knew of this action was when Petitioner Hall and their same set of attorneys filed their motion to dismiss in Federal Court on the alleged grounds of res adjudicata in the totally unrelated proceedings having to do with an agreed property settlement judgment only, had without their knowledge in State Court.

In fact, the record should reveal that although the Midland attorney for the Bleischs' insurance carrier requested that Petitioner Halls' attorney draw a dismissal without prejudice to the Bleischs' claim for personal injuries, this same set of attorneys who are now representing these Petitioners on this highly technical ground for appeal, did not do so, but instead made an attempt to dismiss with prejudice the Bleischs' claim for known serious and costly personal injuries at the same time the piddling property damage settlement was effected between the three insurance companies.

Respondents and their California personal attorney knew nothing of these alleged friendly State Court proceedings. They later employed present counsel to file their primary claim for personal injuries for the first time in the proper Federal Court on the basis of diversity of citizenship. The Coles were never made parties to this latter suit.

Petitioners are still alleging error in spite of the correct Fifth Circuit Opinion and Judgment, because the Trial Court would not dismiss this primary suit which has been properly tried in the Federal District Court, after all of these same allegations were properly overruled by the Court, on the apparent grounds they did not come into Federal Court with clean hands, and were trying to foster upon the Court the mistaken and mislabeled theory of "compulsory Counterclaim" rules, where none were involved. Nothing but an insignificant "cross-claim" was involved in the controversy in State Court where the three insurance companies settled a small property damage claim on the Cole automobile and third party Cole is not and never has been a party to the primary suit.

Respondents say that the overruling of Petitioners' motion to dismiss by the Trial Court was proper. The Federal Jury awarded close to $18,000.00 for serious personal injuries to Respondents, all of which injuries these Petitioners and their attorneys were well aware of when they made their unsuccessful bid to wipe out Respondents' claim for personal injuries and property damages by attempting to induce both the trial court and the Court of Appeals to condone their gross attempt to steal a base on a foul ball in the property damage action only, had in State Court.

The Trial Court, in effect, merely ruled that Petitioners would not be permitted to steal all four bases in State Court for a home run, because they did not have a legal right to be on first base on an illegal foul ball in the first place.

REASONS FOR DENYING JURISDICTION

Respondents respectfully point out that the Honorable United States Supreme Court should dismiss this Petition for Writ of Certiorari for want of jurisdiction, or, in the alternative, refuse same for the following reasons:

1. There is no Constitutional question to be decided in this appeal, and alternatively, even had there been one involved, Petitioners totally failed to assign as error either in the Trial Court, or the Circuit Court of Appeals any alleged violation of the Fifth Amendment to the Constitution of the United States. Neither was this question dealt with by the Circuit Court of Appeals.

2. The assertions or allegations set out in Petition for Certiorari are totally absent any question of any substantial public importance or peculiar gravity, and do not

present for review any important or difficult questions of federal-state relations.

3. The assertions or allegations set out in Petition for Certiorari do not involve or call for resolving diversities or conflicts occurring among the courts of the different Federal Districts and or among the U. S. Courts of Appeal, or resulting from any type of concurrent State or Federal Jurisdiction.

REASONS FOR DENYING WRIT

I.

The United States District Court and Court of Appeals did not fail to give full faith and credit to the prior state court judgment, which was for property damages only by a third party never a party to the present suit, which judgment was not, and could not have been res adjudicata to the claims for personal injuries awarded and allowed respondents by both the Trial Court and the Court of Appeals.

II.

Respondents never elected to assert a cause of action in the state court for negligence against petitioners, because a property damage claim only was brought by a third and unrelated party against both respondents and petitioners in state court as co-defendants only, which claim was settled by and between the respective insurance companies and the third party, without the knowledge or consent of respondents. This was done and the judgment distinctly recited "without prejudice" to the rights of respondents to bring their primary claim for damages for personal injuries against petitioners. Hence it did not constitute a withholding of elements of the previous state court action for later independent adjudication in federal court as alleged by these petitioners.

III.

The separate actions and role of the insurance carriers for both respondents and petitioners, together with the separate legal counsel for both insurance companies, who settled without respondents' knowledge or consent a small property damage claim by agreed state court order of dismissal, which was originally brought by an independent and separate third party was not res adjudicata as to these respondents, and did not bar the separate and independent claim for personal injuries that has been asserted in federal court.

Respondents have no quarrel with the rules and cases cited out of context in connection with their assertion that the United States Court of Appeals failed to give full faith and credit to the prior state court judgment which awarded a small amount of property damage to a third party as against both respondents and petitioners as co-defendants in the insurance "cross-action" brought and closed out in the State Court, because there was nothing contained in the State Court Judgment, precluding Respondents from bringing their primary suit for damages for personal injuries and negligence against the Petitioners in a Federal Court action.

The Court of Appeals could not possibly give full faith and credit to something that allowed absolutely no credit to Respondents in the first place. Neither did Petitioners even raise or assert this alleged violation of their constitutional rights in either the Federal Trial Court or Court of Appeals. Therefore, they should not be permitted to raise same for the first time in this Honorable Court.

Petitioners are in effect saying in spite of all the above, the Court of Appeals should have inserted and read into the State Court order of dismissal a mandate for both new Texas State law plus a new federal hold-

ing, ruling that an optional "permissive cross-claim" should be binding on all parties as a "compulsory counterclaim". Such was never the law or rules under either Federal Rule 97 (a), and Texas Civil Procedure Rule 13 (a).

Petitioners cited and quoted very sparingly from the Texas Supreme Court case of *Ogletree* v. *Crates,* 363 S.W. 2d 431 (1963), allegedly for the proposition that "the rule of res adjudicata in Texas bars litigation of all issues connected with a cause of action, which might have been tried in the former trial". This case involved an attempt by a mother to regain custody of minor child awarded to father in previous Alabama judgment on grounds of changed conditions, in order to secure a change of custody. There was no question of "permissive cross-claims" or "compulsory counterclaim" involved in this suit.

The Court merely ruled that the same facts considered in the Texas custody squabble were considered by the Alabama Court, and there was no point in permitting a change without any change of facts.

The Texas intermediate Court of Appeals case of *Lacy* v. *Carson Manor Hotel,* 297 S.W. 2d 367, cited but not quoted by Petitioners on their allegation of violation of the full faith and credit clause of U. S. Constitution, is neither in point nor applicable. In that case it was held that the two year statute is applicable to a suit merely for damages arising from a written contract induced by fraud, which conclusion they said rendered it unnecessary to consider the res adjudicata question in connection with compulsory counterclaims, etc.

Therefore, when it is all summed up, the adversary parties here, were co-defendants in the State court prop-

erty damage claim brought through a separate third party, on behalf of his insurance carrier, and did not present any type claim against each other, except to ask for indemnity as against each other, in case either or both got stuck on the third parties' property damage insurance claim.

Neither does the fact that the insurance companies and their counsel entered an agreed judgment dividing up the spoils on the third parties' property damage claims cut any ice regarding any "full faith and credit" question.

Petitioners refer to the "scanty opinion" of the Court of Appeals, because it did not cite any cases in support of its position. Petitioners admitted there were none. This admission at page 13 of their Petition, would appear to conclusively show (1) there is no constitutional question to be decided; (2) that the questions asserted by Petitioners are totally absent any question of substantial public importance; and, (3) there is no conflict between other federal Districts, which completely obviates any grounds for allowing their Petition for a writ, for the reasons they try to set out.

In the prior State Court proceeding, suit was instituted by Plaintiff Cole against the primary defendants and Petitioners and also Respondents as co-defendants for property damages *only* to a parked vehicle sustained by Cole and his motor company and his insurance carrier. Insurance counsel for both Petitioners and Respondents answered Plaintiff Cole's Petition and then filed a permissive "cross-claim" against each other for indemnity or contribution, on the property damages only.

Petitioners now contend that based upon their attempt to field a foul ball, they are now entitled to a home run by alleging that the filing of the "cross-claim"

required Respondents to submit and allege their primary claim against Petitioners for their known serious personal injuries and property damages, as a "compulsory counter-claim".

By virtue of the State and Federal Rules of Civil Procedure, a cross-claim for indemnity or contribution may be filed against a co-party. Rule 97 (e), Texas Rules of Civil Procedure, states:

> "*Cross-Claim against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim *may* include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

Rule 13 (g), Federal Rules of Civil Procedure, also allows a co-party to file a cross-claim for indemnity or contribution as follows:

> (g) Cross-Claim against Co-Party. A pleading *may* state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or *may* be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

It has always been Respondents' contention that the filing of cross-claims for indemnity or contribution, under either the State or Federal Rule provisions stated above, as co-parties in the prior state action for property damages only to Cole's automobile, did not operate and make Respondents' independent claim for personal in-

juries and property damages, a compulsory counterclaim in the prior state proceedings, which was settled by counsel for all of the insurance companies without consent or knowledge by Respondents. Both Federal Rule 13, and Texas Rule 97, have separate provisions as to compulsory counterclaims. Counterclaims are to be asserted against opposing parties. Federal Rule 13 (a) states as follows:

> "(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim within the jurisdiction of the Court, not the subject of a pending action, which at the time of filing the pleading the pleader has against an opposing party, if it arises out of the transaction or occurrence that is the subject matter of the *opposing party's* claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

As stated, compulsory counterclaims are to be filed against an *opposing party*. Respondents and Petitioners were not "opposing parties" in the prior state action for Cole's property damage only claim, as intended by the State and Federal Rules of Civil Procedure.

The distinction between a cross-claim and compulsory counterclaim is the parties involved. There is a definite and clear distinction between a cross-claim and counterclaim, and such distinction is of utmost importance. The Honorable Trial Court noted and observed the distinction when overruling Appellants' Motion to Dismiss.

> "Under Federal Rule 13, a counterclaim is a claim against an opposing party, while a cross-claim is against a co-party." Wright, Federal Courts, C. 10, § 80, Cross-Claims, at p. 306.

Stated in a similar way:

> "Cross-claims are litigated by parties on the same side of the main litigation while counterclaims are litigated between the opposing parties to the principal action. A failure to mark this distinction has resulted in some decisions treating counterclaims as cross-claims and even defining a cross-claim in terms equally applicable to a counterclaim." Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, *Vol. 1A, C. 7, §397, cross-claims, at p. 598.*

Therefore, the actions filed between Petitioners and Respondents in the State Court proceedings were cross-claims, *not* counterclaims. Any other claims against each other, as co-defendants, would necessarily have to be cross-claims in the first instance. Neither the State nor Federal Rules of Civil Procedure provide for compulsory cross-claims, and this is basically what petitioners' allegations are.

Respondents did not elect to file a cross-claim against Petitioners in the state proceeding for their personal injuries and property damages as a result of the collision. Because of Respondents' election not to file their claim for personal injuries and property damages against Petitioners as a cross-claim in the lower court, their independent claim could not and is not now barred by the doctrine of res adjudicata, and is and was properly within the jurisdiction of the Federal Trial Court, as ruled by the United Court of Appeals.

> "Cross-Claims are not compulsory; it is discretionary with the party whether to assert his claim as a cross-claim or to reserve it for later independent litigation." *Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, C. 7, § 397, Cross-Claims, at p. 599. Amer. Cur. Co. of N. Y. v. Fazel,* D.C. Iowa, 1956, 20 F.R.D. 110.

> "Even though the test for cross-claim is similar to that for a compulsory counterclaim, it is always discretionary with a party to assert his claim as a cross-claim or to reserve it for later independent litigation." *See Wright, Federal Courts, C. 10, § 80, Cross-Claims, 305-307, at p. 306.*

Since cross-claims are not compulsory, Respondents were not compelled to assert their independent claim against Petitioners in the State proceedings. It was discretionary with Respondents, and they used their discretion and asserted their claim against Petitioners in the Federal Court.

Petitioners further allege that they and Respondents were opposing parties in the State proceedings. Some idea of who are "opposing parties" can be seen in *Barron and Holtzoff (Wright ed.), C. 7, § 398, Opposing Parties, pp. 605-609.* However, references therein are to a primary plaintiff and primary defendant in different capacities. However, in *C. 7, § 397, Cross-Claims, at p. 598, it is stated:*

> "Cross-claims are litigated by parties on the same side of the main litigation, while counterclaims are litigated between the opposing parties to the principal action."

Respondents and Petitioners were not opposing parties to the principal action, and filing of cross-claims did not then make them opposing parties as intended by the rule.

No authorities or cases were cited by Petitioners in the United States Court of Appeals, and Respondents were unable to find any, wherein a cross-claim between co-defendants, not asserted in a prior proceeding, was held to be a compulsory counterclaim under either *Rule 97,*

Texas Rules Civil Procedure, or *Rule 13, Federal Rules of Civil Procedure.*

Actually, none of the cases and authorities quoted, illustrates Respondents' contention that this was a compulsory counterclaim under either Rule 97, Texas Rules Civil Procedure or Rule 13, Federal Rules Civil Procedure. On the contrary, each case and authority illustrates Respondents' contention that the compulsory counterclaim rule applies only to and between the primary Plaintiff(s) and Defendant(s) in the principal action.

Respondents and Petitioners were not primary Plaintiff(s) and Defendant(s) in the state proceeding. Further, each case cited by Petitioners involved a prior suit between a primary Plaintiff and Defendant, and subsequently the prior Defendant institutes a suit against the prior Plaintiff involving the same transaction. Again, the cases and authorities support Respondents' contention that the "compulsory counterclaim" applies to the primary Plaintiffs and Defendants (opposing parties) in the primary action. These are not the facts in the instant case.

Respondents acknowledge that any claim against Plaintiff Cole in the State Court involving the same transaction would have been a compulsory counterclaim as to Cole. However, Respondents have not asserted any claim against Cole in the State Court in the instant suit in either State or Federal Court.

Respondents have no quarrel with the four required conditions making a counterclaim compulsory under either the State or Federal Rules of Civil Procedure, namely:

1. It must arise "out of the transaction or occurrence that is the subject matter of the opposing parties' claim";

2. It must be matured and owned by the pleader at the time he served his pleading;

3. It must not require for its adjudication the presence of third parties of whom the court cannot achieve personal jurisdiction; and

4. It must not have been, at the time the original action was commenced, the subject matter of another pending action.

These are conditions which, if present, make a "counterclaim" compulsory between the *opposing parties* to the principal action. Similar conditions are necessary in cross-claims, but again, an important distinction must be made. Cross-claims may be filed by co-parties, since it is discretionary with the party asserting the claim to plead it or not. However, as between opposing parties to the principal action, if the conditions are present, a counterclaim is compulsory and shall be asserted.

Therefore, whether the conditions are present or not, is only important to a co-party who may want to assert a cross-claim in a proceeding. If the co-party desires not to file his claim as a cross-claim, the presence of the conditions is absolutely of no importance. Further, it will not bar his claim from later litigation.

> "The requirements of a compulsory counterclaim are similar to the requirements of a cross-claim except as to the parties to each." *Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, C. 7, Cross-Claims, at p. 599.*

This is exactly what happened in the State proceedings below. If the conditions necessary to make a coun-

terclaim compulsory under Rule 97 (a), Texas Rules Civil Procedure and Rule 13 (a), Federal Rules Civil Procedure, were present, this merely means that Respondents may have asserted their claim for personal injuries and property damage against Petitioners as a cross-claim. However, Respondents chose, in their discretion, to preserve their valid claim against Petitioners for later litigation, which is allowed by both Texas Rule 97 and Federal Rule 13.

Respondents did not split their cause of action, and fragmentation of a single cause did not result. Respondents acknowledge that the majority rule is that a single wrongful or negligent act or omission causing an injury to both the person and property of the same individual constitutes but one cause of action, and the cause of action cannot be split, and a recovery or a judgment for either item of damage may be pleaded in bar of an action to recover for the other item of damage. *Cormier* v. *Highway Trucking Co., et al.*, 312 S.W. 2d 406 (Tex. Civ. App.); *Garrett* v. *Matthews*, 343 S.W. 2d 289 (Tex. Civ. App.); *Traders & General Insurance Co.* v. *Richardson*, 387 S.W. 2d 478 (Tex. Civ. App., err. ref.).

However, in the instant case, Respondents never split their single cause of action for injuries and property damages against Petitioners. Respondents asserted their single cause of action for injuries and property damages for the first time in Federal Court, which was proper, and a jury returned a verdict in favor of Respondents. At no time previously thereto had Respondents in any manner split or fragmented their single cause of action against Petitioners. Respondents preserved their claim using their permissible discretion as allowed under Rule 97 (e), Texas Rules Civil Procedure and Rule 13 (g), Federal

Rules Civil Procedure, for subsequent litigation in the Federal Court. Therefore, Petitioners' Petition for Writ of Certiorari should be denied and their previous motion to dismiss was properly overruled by the Federal Trial Court and the United States Court of Appeals, both of whom properly held that the rules forbid a home run on a foul ball.

Plaintiffs below herein were and are residents of California and were insured, in regard to the automobile collision, with Liberty Mutual Insurance Company. After being served in California with the pleadings involving Cole's property only damage in the Texas proceedings, Plaintiffs below notified their insurance company in San Jose, California. Thereafter, Plaintiffs below were never notified or informed of any proceedings had in State Court until after the judgment of dismissal was entered in the State action, and not until these Petitioners attempted a home run on a foul ball by filing their Motion to Dismiss in Federal Court.

Plaintiffs below did not consent or have knowledge of any of the pleadings filed in the State action. Further, Plaintiffs below were not notified of any hearings nor were they present at any hearings in the State action. The insurance company for Respondents, by and through their attorney, filed all pleadings in the State action in the name of Plaintiffs below. The insurance company further entered into and consented to judgment of dismissal in the name of Plaintiffs below. All of the above was instituted by Respondents' insurance company or its representatives without Respondents' knowledge or consent. (R. pp. 13-20).

Similar to the facts and circumstances above is *U.S.A.C. Transport, Inc., et al.* v. *Corley*, 202 F. 2d 8, wherein a

truck collided with an automobile driven by Corley. Suit was instituted against Corley. No one with the insurance company discussed with Corley the case against the transport company. The Fifth Circuit of the United States Court of Appeals found the insurer alone (insurance company) procured and executed the settlement and after determining the Georgia State Law, entered judgment in favor of Corley.

The applicable State law in Texas is the same as that of Georgia. The general rule is:

> "A compromise and settlement by an insurer without the knowledge of the insured does not bar an action by the insured against a third party. In such a case the insurer is acting for itself and not as agent for the insured and its settlement with the third party is not evidence against the insured." *32 Texas Jurisprudence 2d, §453, at p. 682.*

In *Wieding* v. *Krisch,* 271 S.W. 2d 458, the driver of Krisch's automobile collided with the vehicle of Wieding. Krisch filed suit for damages and Wieding filed an answer saying he received $1,000.00 from representatives of Krisch and had executed a release to her. Wieding alleged that in receiving the $1,000.00 for his claim against her, she should be forbidden to assert that he was at fault. The court correctly found that where a settlement of a claim against insured, for injuries suffered, had been made by automobile liability insurer without insured's knowledge or consent, it did not bar insured's action against Defendant for damages incurred in the collision.

Likewise stated in the Court in *Hurley* v. *McMillan,* 268 S.W. 2d 229:

> "It is manifest that an insurance company, if it admits that its insured is liable without its insured's knowledge or consent, is acting in its own interest,

> and not as the agent of the insured. The insurer cannot bar the insured's right to recover $24,000.00 damages for injuries received in the collision, by settling the claim of the other party to the collision for $1,325.00." *"City Transportation Co. of Dallas* v. *Vastures,* 278 S.W. 2d 373, 375; *Jackson* v. *Clark,* 351 S.W. 2d 292."

The Texas holdings are similar to courts of sister states. In *32 A.L.R. 2d 937,* the rule was stated:

> "The Courts which have considered the question are agreed that a liability insurer's settlement of a claim against the insured, made without the insured's consent or against his protests of non-liability, and not thereafter ratified by him will not ordinarily bar an action by the insured against the person receiving the settlement on a claim arising out of the same state of facts."

The instant case is similar to those cited. In the prior State action the Plaintiff Cole instituted suit for $1,600.00 property damages. Respondents herein had an independent claim against Petitioners and a right to recover $65,000.00 for personal injuries. Respondents' insurance company entered into the judgment of dismissal with State Plaintiff Cole without the knowledge or consent of Respondents. Therefore, the settlement and agreement for an insignificant sum of property damages to Cole's automobile only, certainly should not, and could not (as found by both the trial court and U. S. Court of Appeals), bar claim for substantial personal injury damages received in the collision.

It is Respondents' contention that the State Court was aware of the holdings, facts and circumstances stated above and therefore entered a judgment of dismissal "without prejudice," and therefore not upon the merits as to Respondents' independent cause of action. A judgment of dismissal not upon the merits in a State Court,

is no bar to an original action for personal injury and property damages in a Federal Court. *Harrison* v. *Remington Papers Company*, 140 Fed. 385, 199 U.S. 607, 50 L. Ed. 331.

Since the judgment of dismissal was made without the consent or knowledge of Respondents and would not bar a subsequent action by Plaintiffs in the State Court, the Federal Court can and did properly entertain the new action of Respondents.

It is to be further noted that the words "with prejudice" were expressly stated in the State judgment of dismissal as to State Plaintiff Cole's cause of action against Respondents, and Petitioners. The words "with prejudice" were intentionally omitted as to Plaintiffs' or Respondents' cross-action indicating that the State Court did not intend to dispose of Respondents' independent action. This would allow the Respondents to pursue their independent claim and choose their own forum of trial.

Under Texas Law, home runs are not permitted on a foul ball, and one having a legal right and choice of cause of action should be able to try it in his own way, and not have some method not of his own choosing thrust on him by his adversary. *Angle* v. *Shinholt, et al.*, 90 F. 2d 294. To allow Respondents to pursue their independent claim in a forum of their own choice would be in conformity with the cases stating a Plaintiff has the privilege of election to choose a forum of trial unless the law requires he surrender that right and litigate his cause of action in a forum chosen by his adversary. *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 199 U.S. 607.

As mentioned above, if Plaintiffs' independent claim was a "compulsory counterclaim" in the prior State action, then his adversary, Defendant herein, was not allowed to choose the forum. On the contrary, a forum

was chosen by State Plaintiff Cole who has no interest in the independent claim of Respondents, and who is not an adversary in the present proceedings.

Respondents allege that such a result was not the intention of either Rule 97 (a), Texas Rules of Civil Procedure, or Rule 13 (a) of the Federal Rules of Civil Procedure. A more equitable result would be that Rule 97 (e) and Rule 13 (g) allows a co-party in a prior suit to file a "permissive cross-action" without them being considered as opposing parties under Rule 97 (a) and Rule 13 (a) of the Respective Rules of Civil Procedure. Therefore, he would not have to submit his independent claim against the co-party as a compulsory counterclaim.

SUMMARY AND CONCLUSION

Respondents' claim for personal injury and property damage was not a compulsory counterclaim in the prior state proceeding under either Rule 97, *Texas Rules of Civil Procedure* or Rule 13, *Federal Rules of Civil Procedure*. Respondents could assert a "cross-claim" of indemnity or contribution under the respective Rules of Civil Procedure. in the third party's property damage claim against Respondents and Petitioners as co-defendants, however, their independent claim for personal injury and property damage against Petitioners was discretionary with Respondents as to whether or not to assert the same as a "cross-claim" in the State proceeding or to preserve it for later litigation. Respondents chose not to assert the independent claim as a "cross-claim" in the State proceeding, but to preserve it for later litigation in Federal Court.

Respondents and Petitioners were not "opposing parties" in the State proceeding, as intended by the rules, and therefore Respondents' independent claim was not a

"compulsory counterclaim" in the State proceeding. Petitioners would like to change the rules and make it so. The impartial umpire in the Trial Court and the United States Court of Appeals correctly ruled it a foul ball.

Respondents' single cause of action for personal injury and property damage against Petitioners was not fragmented or split by the State proceeding. Respondents asserted their claims for personal injury and property damages as one cause and in one suit in Federal Court. Nothing but third-party Cole's property damage and the respective rights of three insurance companies concerning same were ever adjudicated in the abortive State court case. In no sense of the term can it be said that a fragmentation or splitting of a single cause of action of personal injuries and property damages of the Respondents Bleisch resulted by the prior State proceeding, since neither Respondents' injuries or damages were in issue, and there was no judgment entered as to either personal injury or property damages of Respondents. Therefore, Respondents correctly had the right to assert this single cause of action in the Federal Court.

In the alternative, the Judgment of Dismissal in the State Court is not res adjudicata and does not bar an action by the Respondents against Petitioners in the Federal Court, since under Texas holdings, settlement in State Court by respective insurers of a minor property damage claim of a stranger without knowledge of Respondents does not prevent the later assertion of the claim.

In the instant case, all pleadings and settlements were made in the State proceedings, without the knowledge or consent of Respondents. Further, Respondents were not notified of any hearing on the settlements made, nor were they present at any such hearing. Further, the

judgment of dismissal as to indemnity or contribution between Respondents and Petitioners, as co-defendants intentionally omitted the words "with prejudice." The words "with prejudice" were intentionally inserted as to the dismissal between State Plaintiff third-party Cole and Co-Defendants, Respondents and Petitioners.

Any other holding would deprive these Respondents from choosing their own forum for litigation of their independent claim of personal injuries and property damage against Petitioners. Further, the forum would have been chosen by a party who has no interest whatsoever in the litigation between Respondents and Petitioners. Therefore, the Trial Court which was affirmed by the United States Court of Appeals, was eminently correct in overruling Petitioners' Motion for Dismissal, and correctly ruled that they could not win a complete ball game by virtue of trying to garner home runs on a bunch of self-evident foul balls and poor fielding efforts.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully pray that the Petition for Writ of Certiorari be denied, and/or dismissed for want of jurisdiction, thereby upholding the United States Court of Appeals opinion of affirmance per curiam of the correct verdict and judgment of the trial court.

Respectfully submitted,

By .....
JOHNNY SPLAWN

Of Counsel:

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CERTIFICATE

Copies of the above and foregoing brief have been mailed, postage prepaid, to the attorneys of record for Petitioners herein, Stubbeman, McRae, Sealy & Laughlin, P. O. Box 670, Midland, Texas; and Strasburger, Price, Kelton, Martin & Unis, Dallas, Texas, on this the 13th day of January, A.D., 1969

.....

JOHNNY SPLAWN

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25647

HAL HALL AND SNOW BLACKBURN HALL,
Appellants,

vs.

PAUL J. BLEISCH, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(September 30, 1968)

Before Bell and Simpson, Circuit Judges
and Roberts, District Judge

PER CURIAM: The parties to this appeal were involved in a three car accident. The owner of the third car sued them in State court to recover property damages. They cross-claimed, one as against the other, for indemnity as to the third party's property damage. The case was set-

tled by a consent judgment in the State court. Appellees then brought suit in the Federal court against the Halls, seeking damages for personal injuries.

The District court did not err in rejecting the defense based on res adjudicata The issue presented in the federal suit was not in issue in the State court litigation which appellant asserts as having given rise to the bar, nor is it such an issue as would require the application of res adjudicata under Texas law. The case of Ogletree v. Crates, 363 S.W. 2d 431 (Tex. S.Ct. 1963) relied on by the appellants, extends only to requiring the assertion of all defense that a defendant might have against a plaintiff. We do not read it to require the assertion of possible cross-claims by co-defendants.

There is likewise no merit in the contention that the suit is barred by the failure of appellees to comply with the Texas Compulsory counterclaim rule in the State Court litigation. The claims asserted were crossclaims and not counterclaims. Rule 97, Texas Rules of Civil Procedure; Rule 13, Federal Rules of Civil Procedure; and Wright, Federal Courts, p. 306 (1963).

AFFIRMED.